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No. 06-475

SUPREME COURT, U.S.
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IN THE

Supreme Court of the United States

BLUE CROSS AND BLUE SHIELD OF FLORIDA, INC., BCBSM, INC., BLUECROSS BLUESHIELD OF TENNESSEE, CAREFIRST, INC., FEDERAL MUTUAL INSURANCE COMPANY, HEALTH CARE SERVICE CORPORATION, AND MUTUAL OF OMAHA INSURANCE COMPANY,
Petitioners,

v.

ABBOTT LABORATORIES AND GENEVA PHARMACEUTICALS, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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CORPORATE DISCLOSURE STATEMENTS

Petitioners' Statements pursuant to Rule 29.6 were set forth at pages iii-v of the petition for a writ of certiorari, and there are no amendments to those Statements.

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This case illustrates some of the worst abuses of the class-action settlement process. After secretly excluding petitioners' state-court claims from the amount of the settlement, respondents drafted the opt-out requirements in a way to trap unwary absent class members, by specifying the form of transmittal ("first-class mail"), requesting cumbersome information, and requiring that opt-out notices be mailed "in time to be received" by April 11, 2005. Pet. App. 48a. Of the 15 comprehensively researched and scrupulously compiled information packets for the Blue Cross companies' opt-outs mailed in this manner four days before the deadline, one arrived on time, seven arrived between midnight and 6:00 a.m. on April 12, and the seven at issue here arrived days later. Eager to hold on to their windfall, respondents have vigorously contested the timeliness of the opt-outs, even though they suffered no prejudice at all. They expected those opt-outs and took them into account in striking a settlement with the class counsel. In holding that petitioners failed to meet the excusable neglect standard for their opt-outs, the courts below abdicated their responsibility to protect the rights of absent class members to opt out of an egregiously insufficient settlement. The courts functionally ignored the prejudice requirement and denied litigants a right to assume the normal delivery practices of the U.S. Postal Service. Both holdings deepen circuit conflicts that now encompass the vast majority of the circuits.

Respondents engage in a series of mischaracterizations to retain their unjust victory. They seek to distinguish away a well-recognized circuit conflict by erroneously contending that prejudice means something different in the class-action context than it does in the default judgment context and by simply ignoring that courts are on both sides even in those contexts. On the second issue, they mischaracterize the cases on petitioners' side of the 5-4 split as containing only "extraordinary facts" (Opp. 17), but those circuits routinely give weight to reliance on the mails in ordinary circumstances.

I. A DEEP CIRCUIT CONFLICT PERSISTS ON THE PREJUDICE REQUIREMENT UNDER THE EXCUSABLE NEGLECT STANDARD

A. Class-Action Defendants Are Not Exempt From *Pioneer*'s Prejudice Analysis

In the context of excusable neglect, prejudice exists where excusing a missed deadline would deprive the nonmovant of a right or option it would have enjoyed had the deadline been met. A litigant must be in a worse position in litigating its claims or defenses, and not merely lose a windfall dismissal. *See* Pet. 16-17.

Respondents identify no right or option they would lose if the late arrival of petitioners' opt-outs were excused. Respondents' ability to defend the Illinois state claims brought by petitioners nearly two years before seeking to opt out here would in no way be compromised. *See* Pet. 7, 16-17. Nor do respondents dispute that enforcing the deadline would give them a double windfall, because they and class counsel discounted the settlement amount by the value of petitioners' claims on the solid expectation that petitioners would opt out and continue pursuing their Illinois claims. *See* Pet. 8-9, 17. Likewise, respondents do not disagree that requiring petitioners to share in the settlement fund would unfairly diminish the claims of other class members to that fund. *See* Pet. 9-10, 17.

Respondents concede the merit of petitioners' interpretation of prejudice: "The beneficiary of a default judgment is *not* deemed to be prejudiced by having to litigate on the merits." Opp. 15 (emphasis added). Respondents wrongly claim that opt-out deadlines are different because, "[u]nlike the beneficiary of a default, a class action Defendant bargains and pays for a specific outcome or deadline." *Id.* But *courts* approve settlement agreements under Rule 23, and, although Rule 6(b) expressly excludes seven federal rules from the excusable neglect standard, Rule 23 is not among them. In that context, "additional exceptions are not to be implied." *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (internal quotations omitted).

Accordingly, other courts reject the contention that class-action settlement agreements are governed "*only* by black-letter contract law" and hold that a district court retains "special responsibility to see to the administration of justice" and may "assert this power to allow late-filed proofs of claim." *In re Cendant Corp. PRIDES Litig.*, 233 F.3d 188, 194-95 (3d Cir. 2000) (internal quotations omitted).

Those principles apply here. Absent class members like petitioners had no opportunity to engage in any "bargain[ing]" with defendants. And respondents identify no benefit of their "bargain" that they lost from petitioners' opt-outs arriving a few days after April 11. Nor could they: the settlement agreement gave respondents until May 9 to exercise their "blow" rights, and petitioners' opt-outs were excluded from the Rider A "blow" threshold precisely because respondents, class counsel, and the district court all knew that petitioners intended to opt out and they wanted to craft a settlement that would not be upset by those opt-outs. *See* Pet. 8-10. Excusing strict compliance with the deadline here would not deprive respondents of any benefit of their bargain, but rather would give them what they bargained for: a settlement payment that excluded the value of petitioners' claims and left petitioners free to continue litigating their state claims.[1]

B. Courts Are Deeply Divided On Whether The Loss Of A Windfall Constitutes Prejudice

Respondents acknowledge that a deep circuit split exists on whether the loss of a windfall dismissal from an excused deadline constitutes prejudice. They call it "illusory" (Opp. 2), however, because (1) courts of appeals in

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[1] Respondents assert without elaboration that "the April 11 deadline for TPP opt outs was linked to Defendants' deadline to terminate the *direct* purchaser class settlement." Opp. 6 n.6. Although the direct purchaser agreement permitted respondents to terminate it if the blow threshold from the "Indirect Purchaser Litigation is triggered," CA App. 13, No. 06-14055-CC (11th Cir. filed June 27, 2005) ("CA App.") (Direct Purchaser Settlement Agreement at 12), Rider A made petitioners' opt-outs completely irrelevant to that issue, *see* Pet. 8-9.

class actions have *sometimes* recognized litigation exposure on late opt-out claims as a form of prejudice, and (2) courts of appeals in *non-class actions* have *sometimes* refused to find such prejudice. *See* Opp. 12-15.

1. Respondents' distinction is unsound. Whether the deadline is in a federal rule, an approved class-action settlement agreement, or a court ruling, no prejudice arises if the defendant loses no rights or options it would have enjoyed but for the missed deadline. The context of a default judgment or class action does not alter the analysis.

A default judgment precludes any further litigation on the matter. But a court's refusal to grant relief from a tardy opt-out is no less final. It sweeps an unwilling class member into a binding settlement agreement and, as a supposed consolation, provides a pay-out that is often only a small fraction of the harm incurred. The carve-out for class-action defendants urged by respondents is thus highly inequitable. Respondents seek to enforce their supposed "bargain" against petitioners, which, as absent class members, had no part in its making. That lack of privity calls for *more* protection under the excusable neglect standard, not less: "the determination is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

2. Even viewing this solid 5-3 split on respondents' fundamentally flawed terms, it would still merit review.

a. In class actions as well, courts of appeals have declined to find substantial prejudice from loss of a windfall dismissal. As respondents acknowledge (at 13 n.11), the Tenth Circuit has found "no prejudice suffered from the enlargement of time" where a class member sought relief from a tardy opt-out so that it "could pursue potential individual claims in private litigation." *In re Four Seasons Sec. Laws Litig.*, 493 F.2d 1288, 1289, 1291 (1974). The court thus excused strict compliance with the opt-out date negotiated in the settlement agreement by looking to the

effect of excusing the untimely opt-out and finding it not to prejudice the defendants.[2]

Respondents also rely (at 14) on the D.C. Circuit's decision in *In re Vitamins Antitrust Class Actions*, 327 F.3d 1207 (2003), but that case affirmed the district court's finding of excusable neglect based on its judgment that a class-action defendant "would not be substantially prejudiced by [an] untimely opt-out" filed two-and-a-half months late. *Id.* at 1209-10. If respondents' class-action benefit-of-the-bargain theory were correct, then the court would have had to find substantial prejudice.[3]

b. Similarly, courts asked to vacate default judgments based on excusable neglect have recognized *and* refused to find exposure to litigation as a form of prejudice in assessing excusable neglect. *Compare, e.g., Pratt v. Philbrook*, 109 F.3d 18, 22 (1st Cir. 1997) (loss of default judgment is not "the sense in which the term 'prejudice' is used in *Pioneer*"), *with Chrysler Credit Corp. v. Macino*, 710 F.2d 363, 367 (7th Cir. 1983) (having to litigate claims after vacatur of default judgment is prejudicial).

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[2] Respondents seek to distinguish *Four Seasons* on the ground that the appellant, Arthur Andersen, was not a party to the settlement agreement but had resisted the excusable neglect motion because it might be liable for any judgment entered against the (apparently bankrupt) defendants on a "third party liability or indemnity" theory. 493 F.2d at 1289 n.1; *see* Opp. 13 n.11. That distinction is irrelevant because the court was in fact construing the settlement agreement by which the defendants themselves were bound, and any bargain in that agreement was theirs and not Arthur Andersen's. Such third-party liability is functionally no different from an insurance company's potential liability for a judgment entered against its insured.

[3] *Vitamins* conflicts with the opt-out-context holdings of the Eleventh Circuit below and the Third Circuit in *In re Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Products Liability Litigation*, 92 F. App'x 890 (2004), and deepens the intracircuit conflict in the D.C. Circuit between *Pigford v. Johanns*, 416 F.3d 12 (2005) (finding prejudice where excusing late class-action opt-out would remove a windfall dismissal), *cert. denied*, 126 S. Ct. 1581 (2006), and *FG Hemisphere Associates, LLC v. Democratic Republic of Congo*, 447 F.3d 835 (2006) (finding no prejudice from vacating default judgment). *See* Pet. 21-22.

In short, the cases simply do not support respondents' fanciful classifications. Nor is respondents' notion that parties to a class-action settlement can merely contract around Rule 23 (Opp. 18-19) consistent with this Court's repeated admonition that district courts exercise an important case-management role in supervising class-action settlements to guarantee due process protections.[4]

II. THE CIRCUITS ARE DEEPLY SPLIT ON WHETHER RELIANCE ON THE NORMAL COURSE OF MAIL DELIVERY SHOULD BE AFFORDED ANY WEIGHT UNDER *PIONEER*

A. Respondents Do Not Undermine The 5-4 Split

A 5-4 conflict exists on whether reliance on the normal course of mail delivery gets weight in the excusable neglect calculus. *See* Pet. 25-27. Respondents claim that the cases cited by petitioners where courts of appeals have found excusable neglect all involve "extraordinary facts," including long delivery delays and other "unusual circumstances" such as "storms." Opp. 15-17. The issue is not

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[4] *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 853 (1999) (district court's "independent valuation" of a settlement fund prior to class certification is required to protect absent class members' due process interests); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("vital importance" of "undiluted, even heightened, attention" to class settlements). Respondents also claim that this case is not a "good vehicle" because the Eleventh Circuit's order may be affirmed on the alternative ground that the district court was powerless to grant relief from the settlement agreement deadline. *See* Opp. 17-20. Neither of the courts below rested its decision on that ground, *see* Opp. 18 n.19, and none of the cited court of appeals decisions stands for that illogical proposition. In *Holmes v. Continental Can Co.*, 706 F.2d 1144, 1160 (11th Cir. 1983), the court simply explained that a defendant that had agreed to pay a sum certain with no opt-outs could not be compelled to pay that same sum and yet permit opt-outs. In *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1172 (5th Cir. 1978), the court likewise held that a district court may not unilaterally change the settlement amount agreed to by the defendant. Here, respondents discounted the settlement amount expecting that petitioners would opt out, and petitioners seek merely to enforce that agreement. *See also supra* p. 3 (discussing *Cendant*).

what facts would merit a finding of excusable neglect. Rather, it is whether the ordinary course of mailing merits some weight under this Court's *Pioneer* analysis. As respondents concede (at 15-16), five circuits, including the Eleventh Circuit below, reject that proposition and give *no* weight to reliance on the normal course of mail delivery. *Compare* Opp. 15-16 *with* Pet. 26-27.

Another four courts of appeals have squarely held that reliance on the normal course of mail delivery should be given *some* weight. *See* Pet. 25-26. Respondents arrive at their blanket characterization of those cases only by exaggerating the circumstances in which courts of appeals have found excusable neglect as a result of mail delays. In *Tarabishi v. McAlester Regional Hospital*, 951 F.2d 1558, 1563 n.3 (1991), for example, the Tenth Circuit found excusable neglect where a tardy notice of appeal sent three days in advance of its deadline arrived one day late, where mail between the two cities typically arrived in two days. Similarly, in *Gibbs v. Town of Frisco City*, 626 F.2d 1218 (1980), the Fifth Circuit reversed the district court and found excusable neglect not because of "extraordinary facts," "unusual circumstances," or "storms" (Opp. 16-17), but because the three-day delivery time for the tardy-filed notice of appeal exceeded "the published service standards of the United States Post Office" for mail delivery between the two cities in question. 626 F.2d at 1220-21; *see also Sanchez v. Board of Regents*, 625 F.2d 521, 522 (5th Cir. 1980) ("reliance on the normal course of delivery of mail is reasonable"). Far from unusual circumstances, these cases involve, as in petitioners' case, mundane delivery delays in inter-city mailings.[5]

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[5] In the one case involving a storm, the court held that, at a minimum, excusable neglect may be predicated on "uncontrollable delays in mail delivery." *United States v. Carson*, 52 F.3d 1173, 1180 (2d Cir. 1995) (internal quotations and emphasis omitted); *see also Sherlock v. Montefiore Med. Ctr.*, 84 F.3d 52, 525 (2d Cir. 1996) (relying on three-day mail delivery assumption in Rule 6(e)); *Ramseur v. Beyer*, 921 F.2d 504, 507 (3d Cir. 1990) (tardy notice of appeal filings excused "when

The opt-out form *required* petitioners to use "first-class mail" rather than a faster and more reliable method. *See* Pet. 10 & n.15, 24. Petitioners mailed their notices four days in advance of the deadline under circumstances where the U.S. Postal Service says that first-class mail typically arrives in 2-3 days. *See* Pet. 23-24.[6] Thus, according to the Postal Service itself, petitioners allowed *more* time than necessary. What the post office did in the delivery process was not under their control. Indeed, all 15 of the Illinois TPP opt-outs were mailed at the exact same time from the exact same post office. Yet one arrived by April 11, seven others arrived on April 12 just four hours after the midnight deadline, and petitioners' seven notices arrived on April 13 and 15. *See* Pet. 11-12. Petitioners would be eligible for relief under these circumstances in at least four circuits, but foreclosed in five others. This deep circuit conflict on an issue of recurring importance to litigants warrants this Court's review.

B. Petitioners Exhibited Good Faith

To opt out, petitioners were required to compile thousands of employer identification numbers – data not readily available in existing databases. In addition, despite the fact that the requested individual drug purchase data were not expressly required, petitioners in good faith undertook the mammoth task of compiling those data because the opt-out notice claimed that respondents needed them before May 9 to evaluate their rights under the then-sealed Rider A blow provision. *See* Pet. 11. To be sure, petitioners could have filed their notices without those data and made respondents compel their production "via subpoena," Pet. App. 46a, but that would have made

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they are mailed at such a time and in such a manner that, under normal circumstances, the district court would have received them in a timely fashion").

[6] Respondents repeatedly suggest that petitioners should have sent their notices by Priority Mail. *See* Opp. 1, 7, 11, 24. But they nowhere dispute that the Postal Service reports precisely the same delivery time for priority as for regular first-class mail. *See* Pet. 23-24.

it highly unlikely for respondents to receive the data before May 9. Petitioners instead chose *voluntarily* to comply with the request and thereby to incur tens of thousands of dollars in costs, including 950 attorney and staff hours, plus substantial costs billed by an outside data processing firm. *See* CA App. 217-20 (Hardy Vieux Decl.).

Respondents claim that, to exhibit good faith, petitioners should have *ignored* the request for data that respondents said they needed and mailed the forms earlier. *See* Opp. 20-26. The irony of respondents' approach is readily apparent, for petitioners' good-faith compliance with respondents' request was expensive and time-consuming. Moreover, as respondents then knew but petitioners did not, Rider A deemed petitioners' opt-outs – and therefore the requested drug purchase data – completely irrelevant to calculating any termination rights that might have arisen for respondents on May 9. Respondents' request for drug payment data was thus a highly disingenuous form of "gotcha," causing petitioners to waste significant resources and ultimately to lose their opportunity to opt out. In granting certiorari and reversing the decision below, this Court should renounce the types of burdensome and unnecessary opt-out conditions that can make it difficult and expensive for class members seeking to exercise their due process rights to opt out of an insufficient class-action settlement and pursue their individual claims.[7]

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[7] Respondents disingenuously assert that petitioners misrepresent that the drug purchase data were "required" rather than "requested." Opp. 1, 8-10, 25. Petitioners' excusable neglect motion acknowledged at page one that the data were "requested" (Dist. Ct. Docket 1580). Petitioners' supposed misrepresentation was a single misstatement in oral argument that counsel quickly corrected. Respondents nonetheless repeatedly mischaracterize petitioners' position, even though it has no bearing on the issues before this Court and it in no way undermines petitioners' good faith in providing the voluminous requested data. Respondents next complain (at 10) that Kaiser and CareFirst did not supply the requested drug purchase data, but Kaiser did so in discovery and CareFirst does not operate in the 18 states covered by the class, so it had claims only where its members filled prescriptions

Respondents' misguided attack on petitioners' integrity next asserts that petitioners' claim to have allowed four days for mailing is "highly misleading." Opp. 7. Respondents characterize the time period as, alternatively, "*one business day*," "a couple of days," and "one or two days." Opp. 15, 21, 26; *cf.* Opp. 15 n.14 ("three days"). But the time between Thursday night, April 7, and Monday night, April 11, was plainly four days. In thus mischaracterizing a basic and indisputable fact, respondents tacitly acknowledge the inequity in their position (and that of the court below) that petitioners fully "assumed the risk" that their notices would not arrive on time, even though petitioners allowed an extra day in addition to the normal 2- to 3-day course of first-class-mail delivery and were not permitted by the opt-out form to send it in any manner other than first-class mail. Such reliance is given strong weight in four circuits, but none in five others.

Finally, respondents wrongly claim that petitioners' position "would transform all filing deadlines into postmark deadlines." Opp. 26. Rather, it would require the court to give weight to reliance on the normal course of mail delivery in balancing the *Pioneer* factors. Where, as here, the opt-out notice negotiated by respondents with plaintiffs' class counsel *required* petitioners to use first-class mail rather than a faster or more reliable service, petitioners should be permitted to rely on the Postal Service's normal practice in assessing their excusable neglect.

CONCLUSION

The petition for a writ of certiorari should be granted.

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while traveling – a complication that prevented completing the calculations in time. Respondents also complain (*id.*) that Federated Mutual did not provide EINs for self-funded plans, but that entity had no self-funded plans to report.

Respectfully submitted,

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